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Shelly Hipwell v. Roger Sharp, tim W. Healy, and Does I through X : Brief of Intervener

Utah Supreme Court

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IN THE UTAH SUPREME COURT

SHELLY HIPWELL, an individual by and through her guardians, SHERRY JENSEN and SHAYNE HIPWELL,	:	
Plaintiffs-Respondents,	:	Case No. 92
vs.	:	Priority No.
ROGER SHARP, TIM W. [illegible], and DOES I through X,	:	
Defendants-Appellants.	:	

BRIEF OF INTERVENER STATE OF UTAH

On Interlocutory Appeal from an Order of the Third Judicial District Court, Salt Lake County, State of Utah, in Civil No. 910905017CV, the Honorable J. Dennis [illegible]erick presiding.

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IN THE UTAH SUPREME COURT

SHELLY HIPWELL, an individual by and through her guardians, SHERRY JENSEN and SHAYNE HIPWELL,	:	
Plaintiffs-Respondents,	:	Case No. 920218
vs.	:	Priority No. 11
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BRIEF OF INTERVENER STATE OF UTAH

STATEMENT OF JURISDICTION

The State agrees with the statements of jurisdiction included in the parties' briefs.

STATEMENT OF THE ISSUES

The State has no direct interest in the outcome of this case and appears pursuant to its statutory right under Utah Code Ann. § 78-30-11 to be heard on the constitutional issues raised by the parties. Therefore, this brief addresses only those issues stated in the parties' briefs.

DETERMINATIVE PROVISIONS

The following constitutional and statutory provisions are attached as Addendum A.

Utah Constitution, article I, section 11.

Utah Code Ann. §§ 63-30-3, -4, -10 and -34 (1989).

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The State understands the nature of the case, course of proceedings below and facts to be as set forth in the parties' briefs.

SUMMARY OF THE ARGUMENT

The appellants' contention that the proprietary/ governmental distinction did not apply to the State or its subdivisions at common law, but only to municipalities, is well-founded. Thus, Hipwell had no common law remedy against any governmental entity for the injuries she sustained at the University Hospital. Moreover, under the discretionary/ministerial function distinction as applied at common law to determine official immunity, Hipwell had no remedy against any government employee for those injuries. Thus, the damages limitation provisions of the Utah Governmental Immunity Act did not transgress Hipwell's rights under the open courts clause. Neither were Hipwell's due process or equal protection right infringed by the Act where the Act did not deprive her of any common law right of recovery.

Even if Hipwell had a constitutionally protected interest in recovering for her personal injuries, the analysis of the plurality in Condemarin warrants reexamination. In weighing the individual right infringed against the extent to which that particular infringement only would protect the public treasury, the Condemarin balancing test fails to take into account the overall effect of the Act in broadening individual remedies for

governmental torts. Whatever the constitutional basis of review, that overall effect must be considered to avoid straight-jacketing the legislature in a manner that prevents it advancing legitimate governmental objectives.

ARGUMENT

I.

THE PROPRIETARY/GOVERNMENTAL DISTINCTION DID NOT APPLY TO THE STATE AT COMMON LAW

As explained in the appellants' briefs, the proprietary/governmental distinction did not apply to the State or its subdivisions at common law, but only to municipalities. Indeed, in arguing that at the time of the adoption of the open courts clause the State engaged only in functions that would be considered governmental under the proprietary/governmental test, Hipwell concedes that a right to recover for personal injuries resulting from proprietary functions of the State had not been established at that time. As stated by this Court in Berry v. Beech Aircraft Corp., 717 P.2d 670, 676 n. 3 (Utah 1985), "the common law at the time of statehood provides a measure of the kinds of legal remedies that the framers must have had in mind (at least in scope if not in form) for the protection of life, property, and reputation." Thus, the open courts clause does not protect any right to recover for personal injuries resulting from proprietary functions of the State.

Hipwell's hypothesis that state government existed in only a primordial form at the time of the adoption of the

constitution is completely unsupported.[1] Moreover, the since the common law on governmental liability continued to develop even after the adoption of the constitution, at least until the adoption of the Utah Governmental Immunity Act in 1965, Hipwell's hypothesis fails to explain why, as she concedes, no case arose during that time allowing recovery against the state based upon the governmental\proprietary test.[2]

Hipwell's interpretation of the Bingham v. Board of Education of Ogden City, 223 P.2d 432 (Utah 1950), is inaccurate. Had this Court applied the governmental/proprietary distinction to the particular function that caused the injury in that case, it would have denied the city immunity. The injury in Bingham arose, not from the school board's alleged negligent performance of its educational function (i.e., as in failing to teach Jane and Johnny to read and write), but from the operation of an incinerator to burn books on school grounds -- a proprietary function. Thus, it

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[1]Hipwell cites Green v. Commonwealth, 435 N.E. 2d 362, 365 (Mass. App. 1982) in support of her hypothesis. That case, however, recognized that, before the enactment of the Massachusetts Tort Claims Act, the "exception for private nuisance was the only judicially created exception to the otherwise general principle that the Commonwealth was immune from tort liability absent a clear statutory authorization to the contrary." The Massachusetts court went on to expressly overrule the lower court's decision applying the proprietary/governmental distinction to the state on the ground of stare decisis. Thus, Green refutes, rather than supports Hipwell's theory.

[2]Meanwhile, courts in numerous other jurisdictions expressly declined to apply the distinction to the state. See James, Tort Liability of Governmental Units, 22 U. Chi. L. Rev. 610, 619-20 & n. 55 (1955). The more plausible explanation for the absence of any Utah cases directly on point is that the nonapplicability of the distinction was scarcely to be doubted.

was the character of the school board itself, rather than the nature of the particular function that gave rise to the injury, that shielded the city from liability. The same holds true for the Campbell Bldg. Co. v. State Road Comm'n, 70 P.2d 857 (Utah 1937), case also cited by Hipwell. In both cases, the court considered the purpose of the agency involved (i.e. whether or not it was performing a governmental function) in determining whether the agency was an arm of the state to be accorded absolute immunity and accorded no significance to the particular function that gave rise to the cause of action.[3] Cases such as Bakken v. State, 219 N.W. 2d 834 (N.D. 1928) (declining to apply sovereign immunity to the operation of the North Dakota Mill & Elevator Association by the state) are similarly explained and thus fail to support Hipwell's theory. See also, Union Trust Co. v. State of California, 99 P. 183, 188-89 (Cal. 1909) (holding board of works immune for breach of contract on ground that "the opening of streets and the condemnation of the necessary lands . . . are among the most familiar governmental powers"); Bank of the United States v. Planter's Bank of Georgia, 24 U.S. 904, 907-08 (1824) (holding the Eleventh Amendment does not apply to action by the United States to recover as assignee of promissory notes issued by a bank of which the state was an incorporator, recognizing that "many States of this Union who have an interest in Banks, are not suable even in

[3]It is worth noting that under the Utah Governmental Immunity Act, immunity for negligence claims such as those apparently involved in Bingham and Campbell would likely be waived. See Utah Code Ann. § 63-30-10.

their own Courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the Bank, and waives all the privileges of that character.")

II.

IN LIMITING THE REMEDY FOR WRONGS COMMITTED BY GOVERNMENTAL EMPLOYEES TO THAT AGAINST THE GOVERNMENTAL ENTITY, ABSENT FRAUD OR MALICE, THE UTAH GOVERNMENTAL IMMUNITY ACT FULLY COMPORTS WITH THE OPEN COURTS CLAUSE

Hipwell correctly observes that the fact that the State was absolutely immune at common law, regardless of whether the particular function that caused the plaintiff's injury is characterized as proprietary or governmental, does not end the open courts inquiry. To the extent section 63-30-4(4), which limits recovery against government employees personally to cases in which fraud or malice is established, infringes upon any common law right of recovery, it must be also be examined under the open courts clause. This is a more complex question than was recognized in Hipwell's brief.

A. The Act Created Remedies Where None Existed At Common Law Against Either The Governmental Entity Or Its Employees

First, Hipwell assumes, without analyzing the issue, that there existed at common law a broad right to recover for personal injuries against employees of a state-owned hospital. This was far from the case.

Recognizing that a suit against a public officer was

often in effect a suit against the state, and that, if held personally liable for their official judgments, responsible individuals would either be discouraged from accepting public employment or be unduly intimidated in carrying out their duties, courts granted public employees extensive immunities at common law. Indeed, as acknowledged in 1955, ten years before the enactment of the Utah Governmental Immunity Act, "The courts have tended in recent years to build up a larger and larger area of privilege or immunity for the officer with respect to his official conduct." Fleming James, Jr., Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 640 (1955).

The discretionary/ministerial function distinction was the most widely-applied basis of official immunity at common law.[4] Under the discretionary/ministerial function analysis, an official was held liable only for ministerial acts, but not for acts which required the exercise of discretion or judgment. See, e.g., Connell v. Tooele City, 572 P.2d 697, 699 (Utah 1977).

In 1946, the term "discretionary function" was imported into the realm of governmental entity liability by the Federal Tort Claims Act ("FTCA"), which partially waived the absolute sovereign immunity of the United States. Section 2680(a) of Title 28 of the United States Code excepts any claim based on the exercise or performance, or failure to exercise or perform, a discretionary

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[4]Others include the absolute immunity granted judicial officers and the good faith immunity generally accorded prison officials. See, e.g., Sheffield v. Turner, 212 Utah 2d 314, 316-17, 445 P.2d 367, ___ (Utah 1968).

function or duty from the FTCA's waiver of the United States' immunity from liability for injuries caused by the negligence or wrongful conduct of its employees. 28 U.S.C. § 1346(b).

Under the FTCA, the term "discretionary function" acquired a new, more restrictive meaning than it had in the common law of official immunity. "Beginning with the two root cases of Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) and Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), the lines in federal cases have been consistently drawn between those functions ascribable to the policy making level and those to the operational level." Little v. Div. of Family Services, 667 P.2d 49, 51 (Utah 1983). Since the policy/operational distinction developed under the FTCA, it had never applied to the common law of official immunity. See, e.g., Kendall v. Stokes, 44 U.S. 86 (1845) (post-master general immune from liability for writing-off debt to plaintiff); Hicks v. Davis, 163 Pac. 799 (1917) (state auditor refused to determine validity of claim against state). Cf. Boyce v. United States, 93 F. Supp. 866 (S.D. Iowa 1950) (United States immune from liability for damages caused negligent dynamite blasting); Harris v. United States, 205 F.2d 765 (10th Cir. 1953) (United States immune from liability for negligent herbicide spraying). Cf. Bermann, Integrating Governmental and Officer Tort Liability, 77 Colum. L. Rev. 1175, 1182 & n. 49 (1977) (noting that whether official and entity liability are co-extensive depends on whether the term "discretionary" is given the same meaning for purposes of both

governmental and officer immunity).

The difference in the meaning of the term "discretionary" in the two contexts was expressly recognized in Estate of Burks, 438 F.2d 230 (6th Cir. 1970). In Burks, the court rejected the argument that a Veterans' Administration hospital administrator and psychiatrist should be held liable for negligently permitting the escape of a mental patient, stating:

> Appellant urges that "discretion" means the same thing in the context of executive privilege as it does under the Tort Claims Act, where the government has been held liable for negligence in the treatment or custodial care of patients.
>
> We cannot agree that "discretion" can be read so narrowly as it is now under the Federal Tort Claims Act, which has been liberally interpreted to provide a remedy against the government. The Act's liberal construction ought not to be extended to limit the immunity of federal employees. Liability of the government itself for wrongs committed by its employees will not have the same inhibiting effect on governmental operations as the personal liability of an official. The Tort Claims Act seeks to bar only those suits where the "discretion" is that involved in the formation of policy, rather than its operation.

Id. at 234. Accordingly, the court held the hospital director immune and stated, "[w]hile Doctor Ging [the treating psychiatrist] had less discretion, nevertheless in her diagnoses and treatment of patients and in her supervisory powers over other employees she was vested with discretion. She is entitled to immunity from suit." Id. at 235.

Thus, contrary to Hipwell's assumption, courts generally found government physicians immune for medical malpractice and

similar claims at common law. See also, Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976) (Army surgeons immune from allegedly negligent performance of gall bladder operation on civilian); Taylor v. Glotfelty, 204 F.2d 51 (6th Cir. 1952) (prison psychiatrist immune from liability for allegedly defamatory diagnosis of patient's mental condition).[5]

In interpreting the "discretionary function" exception of the Utah Act, this Court has followed the lead of cases interpreting section 2680(a) of the Federal Tort Claims Act. See Doe v. Arguelles, 716 P.2d 279, 282-83_ (Utah 1986); Little v. Div. of Family Services, 667 P.2d 49, 51 (Utah 1983); Frank v. State, 613 P.2d 517, 519 (Utah 1980). Thus, the scope of the discretionary function exception as applied to governmental entities under the Act is far narrower than the immunity for discretionary functions accorded employees at common law. In permitting liability against the entity in circumstances in which

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[5]Cf. Brown v. Northville Regional Psychiatric Hospital, 395 N.W. 2d 18 (Mich Ct. App. 1986) (medical decisions are discretionary and protected by governmental immunity); but see Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977) (adopting Federal Tort Claims Act definition of discretionary in holding Air Force physician liable on medical malpractice claim). As Jackson demonstrates, the interpretation of discretionary function under the FTCA influenced the subsequent development of the law of federal official immunity. Nevertheless, the Indian Towing definition of discretionary function was never adopted by the United States Supreme Court in determining official immunity. See Westfall v. Erwin, 484 U.S. 292, 298 (1988) (declining to "define the precise boundaries or official immunity or to determine the level of discretion required before immunity may attach"). In the federal realm, the issue of official immunity has been largely resolved by an amendment to the FTCA which expressly immunizes federal employees. See Federal Employee Liability Reform & Tort Compensation Act of 1988, 1988 Amendment to 28 U.S.C. § 2679.

the employee would have been immune at common law under the discretionary/ministerial function doctrine, the Utah Act significantly broadens individual remedies for personal injuries for governmental activities.

B. Even Where A Remedy Existed Against Governmental Employees At Common Law, The Utah Governmental Immunity Act Provides A Constitutionally Adequate Substitute Remedy

Even in cases in which the government employee would have been found liable under the discretionary/ministerial function test at common law, the limited substitute remedy against the governmental entity provided by the Act satisfies the open courts clause.

In upholding the Workers' Compensation and Automobile No-Fault Insurance Acts, this Court recognized that a limited remedy may be substituted for a more complete common law remedy without transgressing the open courts clause where other benefits of the substituted remedy compensate for the loss in the scope or value of the original remedy. See Masich v. United States Smelting, Refining & Mining Co., 191 P.2d 612 (Utah 1948) (workers compensation); Berry v. Beech Aircraft Corp., 717 P.2d 670, 677 (Utah 1985) (discussing workers compensation and automobile no-fault insurance provisions).

In substituting a limited remedy against the governmental entity for the common law remedy against the individual employee, the Act has significantly enhanced the chances of actual recovery for the victims of governmental torts in two ways:

1. The Act substituted a solvent defendant for an often financially irresponsible defendant.

In the opening paragraph of his essay, Integrating Governmental and Officer Tort Liability, 77 Colum. L. Rev. 1175 (1977), George A. Bermann recognized that recent reforms curtailing sovereign immunity were meaningful because "[e]ven in situations in which litigants already had a cause of action against individual public officials, making the government amenable to suit has enhanced the chances of actual recovery, since officials often lack the means to satisfy judgments rendered against them." In advocating the integration of the rules governing liability for governmental entities and their employees, Bermann contrasted systems based primarily on official liability with those primarily based on entity liability. As to the former, Bermann recognized that "[u]nless all public officials are made to carry a generous quantity of liability insurance, or governments are made to carry it for them, their frequent incapacity to satisfy large judgments would make any such system unacceptable." Id. at 1190.

The relevance of this factor to the open courts question was recognized by Justice Durham's understated observation in Condemarin that "[t]here is no reason to believe that individual employees . . . are more able than their employers to respond in damages or that the entities themselves are likely to be judgment proof." 775 P.2d at 361. In fact, the substituted remedy against the entity is far more certain, and thus more valuable, than the lost remedy against the individual.

Thus, the concern expressed in Condemarin that the limited remedy under the damages caps was grossly inadequate to fully compensate the seriously injured has significantly less weight where the remedy that was eliminated was the common law remedy against individual governmental employees. A multi-million dollar judgment against one person in a government comprised of "armies of anonymous and obscure civil servants" is likely to be just as inadequate. See Fleming James, Jr., Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 640 (1955). See also Id. at 643 ("The rule of immunity of officers for discretionary acts, and its extension, represent a judgment that the benefits to be had from the personal liability of the officer (especially since the prospect of actual compensation to the victim from that source is slight) are outweighed by the evils that would flow from a wider rule of liability."); Kenneth Culp Davis, 3 Administrative Law Treatise § 26.02 at 514 ("In the past, liability of ministerial employees for their unintentional torts has been of little consequence, for such employees usually have been financially irresponsible.")

Here, the parties have made no representations about the financial responsibility of the medical resident who allegedly negligently performed the bone marrow biopsy that caused Hipwell's injuries and, ultimately, her death. It is likely, however, that even if they were entitled to recover against the resident at common law, the plaintiffs would be little more satisfied with that remedy than they are with their settlement against the hospital.

Nor the concept of indemnification have improved Hipwell's chances of full recovery. As Bermann observed, "[t]he most curious aspect of indemnification may be the widespread assumption among scholars that it is in fact practiced . . . . Yet, the assumption that the government generally indemnifies its officials for service-related judgments, or pays those judgments for them, may not be warranted . . . . Fifteen years ago, when the California Law Revision Commission investigated the sovereign immunity problem for what was to become the state's governmental tort claims legislation, it found the practice of indemnification to be 'haphazard and incomplete.' The little research that has been done elsewhere tends to support this conclusion." Moreover, a "major drawback" of indemnification is that "because tort victims still would have an action only against the individual official, their interest in compensation would remain subordinate to the latter's ability to pay." Integrating Governmental and Officer Tort Liability, 77 Colum. L. Rev. 1175, 1193-94 (1977).

2. The Act enhances the chances of recovery by eliminating the need to establish the fault of any individual government employee.

In advocating a system based primarily on the liability of the governmental entity, rather than the employee, Bermann cogently observed: "A further justification for accepting a broader scope of governmental than officer liability is that some losses occasioned by governmental activity may not be traceable to any particular official. For example, legislation may impose

duties upon the government that the latter simply fails to implement. . . . More generally, however, a governmental operation may suffer from inefficiency, delay or other systemic disorders that cannot be laid at the feet of any particular official yet still cause injury that warrants compensation." Id. at 1187.

While some cases, including this one, present no problem in identifying the potentially culpable party, a large class of cases exists in which the alleged fault is systemic -- i.e., no particular blameworthy individual exists. In the latter class of cases, the substitution of a claim against the entity for the claim against the individual actually creates a remedy where none existed before.

Moreover, even where individual blame can be assessed, the benefits gained by eliminating the need to pinpoint responsibility in such cases are significant and inure to both the plaintiff and the state. As noted by Bermann:

> [T]he principle of exclusive governmental liability offers distinct advantages from the point of view of litigation. In its absence, plaintiffs tend to sue multiple defendants as a means of enhancing the likelihood of ultimate recovery. An immediate consequence of joining individual officials and the government as defendants is that the official may need independent legal representation in order to enjoy a conflict-free defense. The cost of those services may pose a major financial hardship. Even if the government pays the bill, as is often the case, the cost will consume precious tax dollars. Furthermore, adding defendants increases the complexity of litigation in nearly every procedural respect. Compounding parties usually means compounding substantive issues as well. Although removing the individual official as defendant normally will not remove

> him as witness, it may lessen and even obviate the need to resolve issues such as good faith or reasonableness upon which personal immunity may depend. Sole governmental liability, in short, promises aggrieved persons adequate compensation for their losses while eliminating the temptation to inject unnecessary defendants and issues into the litigation.

Id. at 1195. In eliminating the need to prove individual liability, the Utah Governmental Immunity Act materially increases the chance that at least some recovery will be obtained, thus substantially improving the plaintiff's position from that at common law.

III.

NEITHER EQUAL PROTECTION NOR DUE PROCESS CREATES A RIGHT TO RECOVER FOR PERSONAL INJURIES WHERE NO SUCH RIGHT IS ENCOMPASSED BY THE OPEN COURTS CLAUSE

Hipwell contends that regardless of whether a right protected by the open courts clause is at stake, the damages caps offend both equal protection and due process by restricting an individual right to recover for personal injuries that exists independently of the open courts clause. Contrary to Hipwell's suggestion that such a right was implied in Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989), Justice Stewart, a member of the plurality in that case, expressly disapproved any reliance upon a substantive due process rationale. Id. at 369.

Moreover, Hipwell's contention appears to go well beyond even the minority approach of Justices Durham and Zimmerman in Condemarin, whose separate analyses were both firmly grounded in the open courts clause. The minority recognized that to the extent

a previously existing right to recovery had been abrogated, the open courts and due process guarantees overlapped. Therefore, disagreeing with Justice Stewart, they deemed a due process analysis which permitted a more flexible approach appropriate. 775 P.2d at 356-360 (J. Durham) and 366-69 (J. Zimmerman, concurring). It is a giant leap from that view to according due process protection to rights of recovery that had never previously existed.

POINT IV

THE ABROGATION OF SOME COMMON LAW REMEDIES WHILE EXPANDING OTHER AVAILABLE REMEDIES WAS A REASONABLE MEANS OF ACHIEVING IMPORTANT LEGISLATIVE OBJECTIVES

In concluding his comprehensive analysis of the reform movement that significantly abrogated the doctrine of sovereign immunity in many states, including Utah, Arvo Van Alstyne noted the emergence of limits on the trend:

> What is occurring is, quite obviously, not the total demise of the long-criticized irresponsibility of public bodies for their torts, but a restructuring of the rules which determine when a tort committed by governmental action is compensable. A full measure of public tort liability comparable to that of private persons and private corporations is manifestly not realistically to be expected of the present movement. [Emphasis in original.] On the contrary, the persistence of significant areas of governmental immunity from liability for injuries resulting from acts and omissions of public employees will undoubtedly continue to be characteristic of the law of most, if not all, states. It is already clear that the crumbling citadel of immunity has stronger foundations than had been generally perceived. The rule of governmental irresponsibility for tortious injuries may have yielded to crippling assaults upon its most vulnerable outposts, but the inner bastions have

> generally survived the attack, more secure, apparently than before.
>
> In short, while substantially broader liability is being increasingly accepted by governmental bodies, a revised rationale has begun to crystalize around a new and more sharply defined set of hard-core governmental immunities. The traditional conceptual distinctions (e.g. the "governmental" - "proprietary" dichotomy) which so often confused the prior law and bemused its critics are being increasingly abandoned. Instead, recent developments stress the identification of functional distinctions rooted in pragmatic policy considerations as the most appropriate guides to liability vel non . . . .
>
> In the long run, the continuing ostensible abrogation of governmental tort immunity will be seen more as a general reordering of the terms and conditions of governmental tort responsibility than an equating of public and private tort law concepts.

[Emphasis added.] Governmental Tort Liability: A Decade of Change, 1966 U. Ill. L. Forum 919, 979-80.

Thus, despite the strong criticism that resulted from their having been extended to an extreme, the traditional justifications underlying the principle of sovereign immunity remain sound. Unlike any private entity, no matter how large, government provides a wide array of services that are essential to the public, which can be performed effectively by no other entity and which subject it to far greater potential liability than any private party. Unlike a private party, which may simply go out of business or seek the protection of the bankruptcy court to avoid an obligation (thereby leaving its tort victims uncompensated), government, having the power to tax, is the ultimate "deep-pocket." Given the economic and political restraints on taxation, however,

result of the vast potential liability of the state could be such severe cutbacks in essential governmental services as to seriously hamper state government. "It is now recognized that under modern concepts of tort law, the wide and varied activities of governments may subject those entities to such liability that their activities will be stymied. It is also recognized that in order to be effective, government must often be active, innovative and unafraid." Thomas W. Rynard, Insurance and Risk Management for State and Local Governments, § 6.01 at p. 4 (Matthew Bender 1991).[6]

Characterized by Van Alstyne as a "rare instance of legislative initiative," the Utah Governmental Immunity Act was a carefully fashioned response to these legitimate concerns. Governmental Tort Liability: A Decade of Change, 1966 U. Ill. L. Forum at 966. The 1965 Act was preceded by a $25,000 two-year study by a special committee of the Legislative Council of the conditions under which immunity should be waived. Report and Recommendations of the Utah Legislative Council 1963-65 (Addendum B). The committee gathered extensive data on the experience of other states, including those in which sovereign immunity had been judicially abolished. Id.; see also 36th Utah Legislature, Record of Senate Proceedings, January 18, 1985, comments of Sen. Charles

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[6]As the quoted statement suggests, Condemarin's requirement that any infringement on a common law right of recovery be "urgently and overwhelmingly necessary" is unduly restrictive and essentially anti-governmental in effect. To be effective, government in a complex, post-modern society must be more than simply solvent.

Welch, Jr.[7]

As recognized by this Court, and as shown in Point III above, the overall effect of the Act was to "considerably broaden" governmental liability. Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1235 (Utah 1980). That broadening, however, was accomplished not by simply expanding governmental liability across-the-board, but by "reordering the terms and conditions of governmental tort responsibility." Because the common law of governmental tort liability depended on conflicting rules of sovereign and official immunity, which in turn rested on such unsatisfactory concepts as the discretionary/ministerial function distinction, such a reordering necessarily involved the abrogation of previously existing rights of recovery.

Thus, although the common law permitted recovery against individual governmental employees in some circumstances while foreclosing it against the state, the reasons for granting immunity to employees may be stronger than those for shielding the

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[7]Condemarin noted that "[t]here is no factual showing in the legislative history or the trial court that the recovery limitation is reasonably necessary for preservation of the public treasury." Because the Committee files were destroyed in accordance with State record-keeping requirements, the bulk of the legislative history of the Act is simply unavailable. The Court's suggestion that the legislative policy must be justified by a factual showing in the courts improperly treats the legislature as, in effect, a court of record. If such a factual showing is deemed necessary, however, the State agrees with Hipwell that this case should be remanded to the trial court to provide the State the opportunity to make such a showing. The State was not given notice of this action until after this interlocutory appeal was taken and thus has had no such opportunity here.

governmental entity:

> The absence of the government's vicarious liability also means little assurance of recovery to the victim of injurious official action. Since neither his master nor his supervisor shares the officer's liability, any recovery must come from the financially weakest link in the chain. Such a principle of liability may be likened to an inverted pyramid; from a viewpoint which stresses the importance of compensation and wide distribution of losses among the beneficiaries of the enterprise that causes them, the present system is well-nigh the worst that can be imagined.

"All in all, the traditional Anglo-American system of state immunity coupled with the officer's liability may well be appraised in Professor Robson's words:"

> 'The liability of the individual official for wrongdoing committed in the course of his duty on which so much praise has been bestowed by English writers, is essentially a relic from past centuries when government was in the hands of a few prominent, independent and substantial persons, so-called Public Officers, who were in no way responsible to ministers or elected legislatures or councils . . . Such doctrine is utterly unsuited to the twentieth century state, in which the Public Officer has been superseded by armies of anonymous and obscure civil servants, acting directly under the orders of their superiors, who are ultimately responsible to an elected body. The exclusive liability of the individual officers is a doctrine typical of a highly individual common law. It is of decreasing value today.'

Fleming James, Jr., Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 639-40 (1955).

The objective of the Utah Governmental Immunity Act in limiting recovery against government employees personally to cases of fraud or malice was to correct this inverted pyramid. Indeed,

this Court recognized as much in Madsen v. Borthick, 658 P.2d 627, 633 (Utah 1983): "The apparent purpose of these two paragraphs [sections 63-30-4(3) and (4)] is to replace the common law of official immunity and its distinction between discretionary and ministerial acts or omissions with a new standard coordinated with the standard of governmental immunity established in the Governmental Immunity Act."

The balancing test used in various forms by the plurality in Condemarin assesses the constitutionality of the abrogation of common law remedies against government employees according to the extent to which those particular remedies would threaten the public treasury. Ironically, that test fails even to take into account the overall effect of the Act in "considerably broadening" other remedies. Aside from whether an equal protection or due process analysis is appropriate, or whether minimal or heightened scrutiny is required, Condemarin failed to accord appropriate weight to the individual benefits created by the Utah Governmental Immunity Act. Even absent an "essentially comparable" substitute remedy for a particular right that has been abrogated right by the Act, Berry v. Beech Aircraft Corp., 717 P.2d 670, 680 (Utah 1985), the broadening of other remedies by the Act must be taken into account in assessing its constitutionality. Taking that effect into account, the Act's substitution of a limited remedy against the governmental entity for the common law remedy against the employee was a reasonable means of achieving important legislative objectives and should be upheld.

CONCLUSION

Hipwell had no common law remedy against the State for the injuries she sustained at the University Hospital because the proprietary/governmental distinction did not apply to the State or its subdivisions at common law and the State was absolutely immune from liability. Neither did Hipwell have a claim against any governmental employee for medical malpractice under the discretionary/ministerial function distinction as applied at common law. Thus, the damages caps did not transgress Hipwell's rights under the open courts clause. Neither were Hipwell's due process or equal protection right infringed where the caps did not deprive her of any common law right of recovery.

In substituting a limited remedy against the governmental entity for the common law remedy against the individual, the Act provided an "essentially comparable" remedy and thus complies with the open courts clause in any event. Moreover, taking the broadening of other remedies by the Act into account in assessing its constitutionality, the substitution of a limited remedy against the governmental entity for the common law remedy against the employee was a reasonable means of achieving important legislative objectives. Therefore, the damages caps should be upheld.

RESPECTFULLY SUBMITTED this 14th day of December, 1992.

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ADDENDA

ADDENDUM A

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

History: Const. 1896.

63-30-3. Immunity of governmental entities from suit.

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental

entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

History: L. 1965, ch. 139, § 3; 1978, ch. 27, § 2; 1981, ch. 116, § 2; 1984, ch. 33, § 1; 1985, ch. 93, § 1.

Amendment Notes. — The 1985 amendment inserted "and other natural disasters" in the second paragraph.

63-30-4. Act provisions not construed as admission or denial of liability — Effect of waiver of immunity — Exclusive remedy — Joinder of employee — Limitations on personal liability.

(1) Nothing contained in this chapter, unless specifically provided, shall be construed as an admission or denial of liability or responsibility insofar as governmental entities or their employees are concerned. If immunity from suit is waived by this chapter, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.

(2) Nothing in this chapter shall be construed as adversely affecting any immunity from suit which a governmental entity or employee may otherwise assert under state or federal law.

(3) The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such

employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through fraud or malice.

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

History: L. 1965, ch. 139, § 4; 1978, ch. 27, § 3; 1983, ch. 129, § 3.

Cross-References. — Compromise and settlement, § 63-30-18.

Payment of medical and similar expenses not admissible to prove liability for injury, Utah Rules of Evidence, Rule 409.

63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions — Waiver for injury caused by violation of fourth amendment rights [Effective until July 1, 1990].

(1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:

(a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused; or

(b) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights; or

(c) arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization; or

(d) arises out of a failure to make an inspection or by reason of making an inadequate or negligent inspection of any property; or

(e) arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause; or

(f) arises out of a misrepresentation by the employee whether or not it is negligent or intentional; or

(g) arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances; or

(h) arises out of or in connection with the collection of and assessment of taxes; or

(i) arises out of the activities of the Utah National Guard; or

(j) arises out of the incarceration of any person in any state prison, county, or city jail or other place of legal confinement; or

(k) arises from any natural condition on state lands or the result of any activity authorized by the Board of State Lands and Forestry;

(l) arises out of the activities of:

(i) providing emergency medical assistance;

(ii) fighting fire;

(iii) regulating, mitigating, or handling hazardous materials or hazardous waste; or

(iv) emergency evacuations; or

(m) arises out of research or implementation of cloud management or seeding for the clearing of fog.

(2) (a) Immunity from suit of all governmental entities is waived for injury proximately caused or arising out of a violation of protected fourth amendment rights as provided in Chapter 16, Title 78 which shall be the exclusive remedy for injuries to those protected rights.

(b) If Section 78-16-5 or Subsection 77-35-12(g) or any parts thereof are held invalid or unconstitutional, this Subsection (2) shall be void and governmental entities shall remain immune from suit for violations of fourth amendment rights.

63-30-34. Limit of judgment against governmental entity or employee.

(1) Except as provided in Subsection (3), if a judgment for damages for personal injury against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds $250,000 for one person in any one occurrence, or $500,000 for two or more persons in any one occurrence, the court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the injury is characterized as governmental.

(2) Except as provided in Subsection (3), if a judgment for property damage against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds $100,000 in any one occurrence, the court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the damage is characterized as governmental.

(3) The damage limits established in this section do not apply to damages awarded as compensation when a governmental entity has taken or damaged private property without just compensation.

History: C. 1953, 63-30-34, enacted by L. 1983, ch. 130, § 3; 1987, ch. 75, § 9.

Repeals and Reenactments. — Laws 1983, ch. 130, § 3 repealed former § 63-30-34, as amended by Laws 1979, ch. 94, § 3, relating to excess judgments, and enacted present § 63-30-34.

Amendment Notes. — The 1987 amendment added to the end of Subsections (1) and (2) "regardless of whether or not the function giving rise to the injury is characterized as governmental," rewrote Subsection (3), and made minor changes in phraseology.

ADDENDUM B

STATE OF UTAH

Report and Recommendations of the Utah Legislative Council 1963-1965

PURSUANT TO TITLE 36, CHAPTER 4, SECTIONS 2
AND 11, UTAH CODE ANNOTATED 1953

SALT LAKE CITY, UTAH
DECEMBER, 1964

the court in habitual truancy cases, clarification of the role of the probation officer, provision for some publicity in major delinquency cases, clarification of the general purpose statement, definitions of neglected and dependent child, qualifications of the probation staff, additional judgeship for the second district and appointive powers of the senior judge, also, designation of the chief probation officer and defining action where adults contribute to the delinquency of a juvenile.

The Committee recommends the Juvenile Court Act as representing an effective, efficient, and conscientious effort on the part of well-qualified individuals who have worked to prepare a bill in the best interests of the State.

Governmental Immunity

The 1963 Legislature directed the Council "to study the effects upon states, their political subdivisions and municipal corporations of waiver of immunity from suit and consenting to be liable for the torts of its officers, employees, and agents as outlined in H.J.R. 21 of the 35th Legislature." (S.J.R. 14, item 2.) The Legislature considered this study of such importance that it separately appropriated the sum of $25,000 and directed the Council to appoint a committee with at least one-third of the membership from the legal profession. The Council appointed a committee of twenty-one members, with representation from the Legislature, the cities, counties, special taxing districts, school districts and other interests.

Bills have previously been introduced in the Legislature to waive governmental immunity. In 1961 a bill was passed, then vetoed by the Governor and in 1963 a bill was introduced but failed to pass.

Research activities include field investigations, gathering of data,

assimilation of information, formulation of proposals, drafting of legislation, and the preparation of a final report. Investigations of the claims experience of the State and its political subdivisions has been included in the Committee study. The extent of insurance coverage by governmental entit the cost of such insurance and claims experience have been part of the study Questionnaires were sent to other states in regard to tort claims and consequential damage claims. The statutes of other states have been reviewed and catalogued. The Utah Code has been carefully examined, section by section. Case decisions have been studied. Conferences have been held with insurance personnel and rating information has been obtained from the National Bureau of Casualty Underwriters. Seven working drafts of legislation have been prepared and studied by the staff, by Committee members, and by the Executive Committee.

The Committee considered the important questions of whether governmental immunity from suit was important in the State and whether legislation was needed.

Numerous citizens have been injured in their person and property by negligent acts of government employees and by the construction of public improvements. In many of these cases no recourse against the governmental entity has been possible. It was found that the present system works substantial injustice to citizens. There is a fear, however, among government officials, that to open the door to unrestrained claims would be too burdensome upon governmental funds.

The Committee concluded that immunity of governmental entities should be waived in relation to responsibility for the negligent acts or omissions of public employees. The Committee was not unanimous in its opinion regarding responsibility for consequential damage. This latter type of claim is

for indirect or consequential damage resulting from the construction of public improvements. It is not necessarily the result of any negligence but is merely the consequence of a particular government activity.

The question of payment of claims was a matter of concern to the Committee. It was found that there is already a limited waiver of immunity in the State. For example, cities and towns can be sued and must respond in relation to defective streets, sidewalks, culverts, and bridges. The State Road Commission has discretionary authority to pay individual claims up to $3,000 for injuries resulting from the negligence of its employees. The Fish and Game Commission must pay for crop damage resulting from wildlife. It was also found that 83% of the political subdivisions responding to the survey already carry automobile insurance, and 30% of those carry comprehensive liability insurance.

On the basis of the best experience available, it appears that vehicle insurance premiums and costs will show little increase should immunity be waived, but there may be an increase of as much as five to six times in the cost of general liability insurance. There would probably be more claims filed and some additional administrative costs incurred in handling these claims.

There was unanimous approval by the committee members that governmental entities should be legally authorized to purchase liability insurance to protect both the entity and the employee.

At the present time claims against the State are reviewed by the Board of Examiners and then passed on to the Legislature for its review and appropriation or refusal. If a state agency is not otherwise authorized by law to pay claims, then the authority of the Board of Examiners must be recognized and claims must be channelled through the Board.

The Committee has prepared a draft of legislation patterned after that adopted in California and in some other states. This legislation reaffirms the rule of governmental immunity, thus eliminating any confusion in the law, and then carves out specific exceptions where, as a matter of justice, immunity from suit should be waived. No effort is made in the bill to create new or unique rules of substantive liability as far as governmental agencies are concerned. Where immunity is waived, liability or responsibility would then be determined by the courts.

A second bill has been prepared which is simply an authorization for the permissive purchase of liability insurance. This latter bill does not waive immunity. It would solve the problem of immunity only insofar as the governmental entity chooses to purchase liability insurance, thereby referring all claims to an insurance carrier.

If the Legislature meets the question of governmental immunity head-on, it can consider the comprehensive draft which defines specific exceptions to immunity and also provides for insurance coverage. The second draft merely permits the purchase of insurance coverage by the governmental entities.

The Committee recommends legislation to solve the problem of governmental immunity.

Justice of Peace

A follow-up to the study made by a State Bar Committee prior to the 1963 Legislature to determine the advisability of reforming the J. P. system was assigned to a committee of the Council. The Committee believes legislation is needed to accomplish the objectives of the assignment. The J. P. system is in need of reform and the Committee is preparing legislation to permit the establishment of "community courts."